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IN THE

Supreme Court of the United States

OCTOBER TERM 1958.

No. 841

ANONYMOUS (No. 14),

Petitioner,

—vs.—

HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York and DENIS M. HURLEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE ALBERT PRESS, INC. — TRIANGLE 5-1058 1059

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE RELIEF SOUGHT BY PETITIONER AND THE DECISIONS BELOW

Petitioner seeks a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department entered on July 21, 1958 denying his motion to vacate a subpoena duces tecum issued to him by respondents and, jointly or in the alternative, a writ of certiorari to review an order of the Court of Appeals of the State of New York made and entered January 15, 1959 denying petitioner leave to appeal to that Court from the aforesaid order of the Appellate Division.

There were no opinions by either the Court of Appeals or the Appellate Division. Copies of the order of the Appellate

Division denying the motion, the order of the Appellate Division denying petitioner leave to appeal to the Court of Appeals and the order of the Court of Appeals denying him leave to appeal, are set forth in Appendix B of the petition (pages 31-36).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28 U. S. C. § 1257 (3).

QUESTION PRESENTED

We find great difficulty in extracting from this buckshot application the alleged substantial constitutional question attempted to be presented.

Boiling the moving papers down to their essence, we believe the question that petitioner wants to present is:

> Does the denial of a motion to vacate a subpoena duces tecum, calling for the production of his financial records, issued to an attorney by the Additional Special Term, raise a substantial constitutional question and present the requisite finality to warrant review by this Court?

Apparently, petitioner is asserting that a federal issue of substance arises from the facts stated in this simple question for what he regards as weighty reasons almost without end. His chief grievance, however, appears to be that there is allegedly no authority in law for the establishment of the Judicial Inquiry and no constitutional basis for its procedures. Specifically, he seems to anticipate a deprivation of Fourteenth Amendment due process by virtue of his projected but mistaken theory that the justice designated to conduct the Judicial Inquiry combines the functions of both judge and prosecutor; that he is at once a one man grand jury and one who

sits in judgment. As we shall hereafter show, the history of Judicial Inquiries conducted in New York State since 1928 demonstrates that there is no merit to this contention.

STATEMENT OF THE CASE

The judicial inquiry ordered by the Appellate Division; the relevant provisions of the order of the Appellate Division

By order dated January 21, 1957, as amended by order dated February 11, 1957,* the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, directed that a judicial inquiry be instituted with respect, *inter alia,* to alleged improper and unethical practices by attorneys and by persons acting in concert with them.

For the purpose of conducting the inquiry, the order provides for the appointment of "An Additional Special Term of the Supreme Court, in and for the County of Kings" and that "Mr. Justice George A. Arkwright,** be and he hereby is assigned to hold such Additional Special Term." The order further provides for the appointment of Denis M. Hurley, Esq., an attorney designated by the Brooklyn Bar Association, to aid in the conduct of the inquiry. The order is based upon statute (See New York State Judiciary Law, sec. 90; *cf.* Rule 4-H of the Special Rules Regulating the Conduct of Attorneys and Counselors-at-Law in the First Judicial Department, Clevenger's Practice Manual, 1958).

Under the terms of the order, the justice presiding at the Additional Special Term is vested "with full power to compel

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* The full text of the order and the amending order are included in Appendix A of the petition.

** By reason of attaining the constitutional age limit, Mr. Justice Arkwright retired on December 31, 1958. In his place, the Appellate Division designated Supreme Court Justice Edward G. Baker to preside over the Additional Special Term.

the attendance of witnesses, their testimony under oath and the production of all relevant books, papers and records."

The subpoena issued to petitioner

The petitioner, an attorney, was served with a subpoena duces tecum dated June 2, 1958. The subpoena, a copy of which is included in Appendix B of the petition, called for the production of certain of the petitioner's financial records. The validity of the subpoena is discussed at page 10 *et seq.*

Petitioner, for the period 1955 to and including October 17, 1958 has been retained in at least 566 contingent-fee negligence cases. (Affidavit of Denis M. Hurley, Esq. in opposition to motion for leave to appeal in record of Court of Appeals herein).

In order adequately to investigate petitioner's professional practices, an examination of petitioner's financial records was imperative; hence the subpoena duces tecum in question was issued.

Petitioner did not produce the records. Instead, he moved to vacate the subpoena and the Appellate Division unanimously denied the motion by order dated July 21, 1958.

Petitioner then moved in the Appellate Division for leave to appeal to the Court of Appeals from the July 21, 1958 order and for a stay. This motion was also unanimously denied by order dated October 20, 1958.

Petitioner also moved for a reargument of the motion to vacate the subpoena duces tecum and for a stay. Again, the Appellate Division, Second Department, unanimously denied the motion by order dated October 20, 1958.

Petitioner then moved in the Court of Appeals for leave to appeal to that Court from the July 21, 1958 order of the Appellate Division. By order made January 15, 1959, this motion was unanimously denied by the Court of Appeals. It is the July 21, 1958 order of the Appellate Division and

the January 15, 1959 order of the Court of Appeals that petitioner now seeks to review, either jointly or in the alternative.

Prior to applying to the Court of Appeals for leave to appeal on January 5, 1959, petitioner had served a notice of appeal to that Court as of right on September 23, 1958. He served an amended notice of appeal on November 6, 1958. These facts were recited in the moving affidavit of petitioner's counsel in the Court of Appeals, sworn to December 15, 1958; they are repeated in the petition here at page 8. That petitioner had purported to appeal as of right was known to the Court of Appeals when it denied his motion for leave on January 15, 1959. Implicit in that denial of leave to appeal by the Court of Appeals was the holding that petitioner had no standing to appeal as of right to that Court (New York Civil Practice Act, sec. 592, subd. 5a). It is obvious, therefore, that petitioner has exhausted his remedies in the courts of New York. This, petitioner confirms by his present application to this Court.

ARGUMENT

THE CONSTITUTIONAL QUESTION ALLEGEDLY PRESENTED IS NEITHER SUBSTANTIAL NOR PROPERLY BEFORE THIS COURT.

1

The power of the Appellate Division to direct the judicial inquiry

The Judicial Inquiry is a non-adversary, non-prosecutorial investigation of a quasi-administrative nature and because of the secrecy injunction of the January 21, 1957 order, its closest analogue is a grand jury proceeding. The Judicial Inquiry will neither end in any decree nor establish any right. (*People ex rel. Kyrlin* v. *Culkin*, 248 N. Y. 465, 479.)

The only function of the Judicial Inquiry is to seek facts and make recommendations to the Appellate Division based on those facts. It is an inquisition into offending practices and its inquiries into the conduct of individual attorneys are made primarily to discover facts which may be useful in the determination of what must be done to eliminate such practices.

Any attorney called before the Judicial Inquiry is a witness only. He is not charged with having committed any of the practices being investigated since under the order of January 21, 1957, the Judicial Inquiry has no power to make any charges. See *People ex rel. Karlin v. Culkin, supra,* at 468-469.

It is clearly within the power and jurisdiction of the Appellate Division to direct the Judicial Inquiry. Section 90, subdivision 2 of the Judiciary Law of the State of New York provides that "the Supreme Court shall have power and control over attorneys and counselors-at-law". Subdivision 6 of Section 90 makes provision for a "preliminary investigation" of charges of misconduct against attorneys.

The Appellate Division itself may conduct such a preliminary investigation or it may designate its nominee to do so on its behalf (*Matter of Bar Association of City of New York,* 222 App. Div. 580, at p. 586). In the instant proceeding the Appellate Division chose to designate as its nominee a Justice of the Supreme Court with an attorney recommended by the Bar Association as his aide.

Both Article VI, Section 2 of the Constitution of the State of New York and Section 86 of the Judiciary Law accord the Appellate Division in each department "the power to fix the times and places for holding special and trial terms of the Supreme Court held therein and to assign the justices in the departments to hold such terms."

Thus, the Appellate Division's order of January 21, 1957 was a valid exercise of its supervisory authority over the bar, as well as the power delegated to it to designate "an addi-

tional special term of the Supreme Court" and appoint the justice to preside therein.

In a case arising from a similar judicial inquiry in 1928, *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470, Chief Judge Cardozo stated the question before the New York Court of Appeals, as follows:

> "The precise question to be determined is whether there is power in the Appellate Division to direct a general inquiry into the conduct of its own officers, the members of the bar, and in the course of that inquiry to compel one of its officers to testify as to his acts in his professional relations."

After a scholarly discussion surveying the history of supervision over the bar by the courts in this country and in England through several centuries, Chief Judge Cardozo declared the unanimous affirmative reply of the Court to the question propounded in the *Karlin* case:

> "We conclude that the refusal (to testify) was a contempt * * * and that the investigation must proceed." (p. 47).

See also:

Matter of Bar Ass'n of City of N. Y., 222 App. Div. 580 (1928);

Matter of Brooklyn Bar Ass'n, 223 App. Div. 149 (1928);

Matter of M. Anonymous v. *Arkwright*, 5 A. D. 2d 790, leave to app. den. 4 N. Y. 2d 676 (1958);

Matter of S. Anonymous v. *Arkwright*, 5 A. D. 2d 792 (1958).

The last two cases cited arose out of this Judicial Inquiry.

In this Judicial Inquiry, the presiding justice is acting as a justice assigned by the Appellate Division to preside as

Supreme Court Justice over the Additional Special Term; he is in general supervision and control of the conduct of the inquiry and investigation. He is the alter ego of the Appellate Division. If the seven justices of the Appellate Division themselves presided over the inquiry, they would be conducting it in the same sense as the justice designated by them to do so. But they would not only find the facts but also take appropriate action on them, if action were warranted. The Justice of the Supreme Court reports only.

It is, however, contended by petitioner that in addition to acting as such justice he is also acting as a prosecutor. This contention is based upon a misconception of the facts and of the law. Section 90 of the Judiciary Law provides for the procedures to be followed in disciplinary proceedings and preliminary judicial inquiries. No reference is made in Section 90 as to whom the evidence shall be presented; for all that appears the evidence could be presented to the entire Appellate Division, to a judge or justice of any court so designated, to an official referee or to an attorney appointed to act as a referee to hear and report. Apparently, a Supreme Court Justice is usually selected so that he may be in a position to hear motions and to hold recalcitrant witnesses in contempt, when necessary. It is plain from this section that the prosecutor of the investigation in such proceedings is either the District Attorney or an attorney recommended by the Bar Association and appointed by the Presiding Judge of the Appellate Division of the Judicial Department concerned. In its January 21, 1957 order, the Appellate Division chose the latter course when it selected counsel for the Judicial Inquiry. Read in the light of Section 90, the January 21, 1957 order can only be construed to mean that the presiding justice is to act as the judge and the counsel is to act as the prosecutor of the investigation. Since, under the order, the justice who presides is directed only to report his findings and recommendations, he is, in effect, simply a referee to hear and

report. In no sense is he a one man grand jury and one who sits in judgment; he has nothing to do with adjudication. His service ends when he files his report with the Appellate Division. It is that Court which decides what further steps should be taken, if any.

2

The litigation in the Courts below lacks the requisite finality for review by this Court

Certiorari is here sought to review an order of the Appellate Division denying petitioner's motion to vacate a subpoena duces tecum. Such an order is clearly not a "final judgment" within the meaning of 28 U. S. C. 1257 (3).

The case of *Cobbledick* v. *United States*, 309 U. S. 323, 327, 328 is controlling. This Court there held that an order of a District Court denying a motion to quash a subpoena duces tecum requiring a witness to appear with certain papers and testify before a grand jury failed to meet the test of "finality" necessary for review. The language of Mr. Justice Frankfurter is particularly pertinent:

> "* * * The proceeding before a grand jury constitutes 'a judicial inquiry,' *Hale* v. *Henkel*, 201 U. S. 43, 66, of the most ancient lineage. See *Wilson* v. *United States*, 221 U. S. 361. The duration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other. That a grand jury proceeding has no defined litigants and that none may emerge from it, is irrelevant to the issue. The witness' relation to the inquiry is no different in a grand jury proceeding than it was in the *Alexander*

case. Whatever right he may have requires no further protection in either case than that afforded by the district court until the witness chooses to disobey and is committed for contempt. See *Hale* v. *Henkel*, *supra*, and *Wilson* v. *United States*, *supra*. At that point the witness' situation becomes so severed from the main proceeding as to permit an appeal." (309 U. S. 327, 328. See also similar holding in *Alexander* v. *United States*, 201 U. S. 117, 121-122.)

3

The pertinent authorities clearly support the legal and constitutional validity of the subpoena

Petitioner's contention that "the subpoena herein is so broad and so wide in scope as to be incapable of compliance therewith" (petition, p. 18) is unavailing in law and without constitutional foundation. Certainly, under the circumstances here involved no constitutional issue arises concerning this particular subpoena duces tecum. We shall so demonstrate.

The subpoena asks only for financial records which any attorney can reasonably be expected to maintain for a five year period, January 1, 1953 through December 31, 1957. All attorneys in the Second Judicial Department, including petitioner, are required to preserve their records of actions, claims and proceedings for at least five (5) years (See Rules 3, 4 and 5 of the Special Rules Regulating the Conduct of Attorneys in the Second Judicial Department, Clevenger's Practice Manual, 1958). In numerous cases arising from non-adversary investigations, both Federal and New York Courts have upheld subpoenas duces tecum considerably broader in scope. Thus, in *Schwimmer* v. *United States*, 232 F. 2d 855, cert. den. 352 U. S. 833, the United States Court of Appeals upheld a subpoena calling for the production before a grand jury of all of an attorney's financial records encompassing a ten year period.

In two recent New York cases, New York appellate courts upheld subpoenas duces tecum issued by a State investigative

agency calling for all financial records of various individuals for periods ranging from 6 to 14 years.

Chait v. *Bromley*, 129 N. Y. S. 2d 142; 283 App. Div. 698; affd. 306 N. Y. 421;

Weil v *New York State Harness Racing*, 205 Misc. 614; 283 App. Div. 808.

See also the analysis and restatement by this Court of the subpoena power and its constitutional limitations in *Oklahoma Press Publishing Company* v. *Walling*, 327 U. S. 186, 194-218.

It is evident, from these authorities, that the overriding consideration in the determination of a motion to vacate a subpoena duces tecum is the paramount importance of the power of Courts to secure documentary evidence through such a subpoena. Moreover, in non-adversary investigations a subpoena duces tecum need not be based upon any specific charge or complaint (*Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 201). Indeed, in such non-adversary investigations a considerable amount of latitude is permissible (*Schwimmer* v. *United States*, *supra*, 232 F. 2d at 862). Consequently, the courts will sustain a subpoena wherein the documents are reasonably identified and described (*Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U. S. at 208-209), provided that an investigatory body has a lawful purpose and the documents sought are relevant to the subject matter of the inquiry. (*Chait* v. *Bromley*, *supra*, 129 N. Y. S. 2d at 146; *Weil* v. *New York State Harness Racing*, *supra*, 405 Misc. at 620.)

The Judicial Inquiry's legitimate purpose is to eliminate offending practices—a purpose specifically provided for under a statute of this State and approved by both the Court of Appeals and the Appellate Divisions of New York State (See *infra*, pp. 6-8).

Only a brief note on the relevancy of the documents sought herein is required. The Appellate Division was informed of

the existence of the offending practices by a petition of the Brooklyn Bar Association, and pursuant to Section 90 of the Judiciary Law, it ordered this Judicial Inquiry. The order of January 21, 1957 demonstrates that the Appellate Division intended that the Judicial Inquiry should investigate *all* phases of an attorney's conduct, in order to ascertain facts which are relevant and material to the determination of whether or not the practices mentioned in the order have been indulged in by the attorney under investigation.

As in the case at bar, one of these many phases must necessarily be an attorney's financial dealings. This, of course, entails an examination of his financial records. Based upon the results of such examinations, the Appellate Division has consistently exercised its power under Section 90 of the Judiciary Law to discipline attorneys for misconduct involving their financial dealings.

See:

Matter of Kaliski, 286 App. Div. 232;

Matter of Wolk, 281 App. Div. 289;

Matter of Griggs, 282 App. Div. 263;

Matter of Markowitz, 277 App. Div. 38;

Matter of Daniel, 256 App. Div. 192;

Matter of Hoenninger, 253 App. Div. 289.

In *Matter of Edge Ho Holding Corp.,* 256 N. Y. 374, the New York law governing "relevancy" of documents which may be sought by a subpoena duces tecum issued by an investigative body was succinctly summarized by Chief Judge Cardozo. Speaking for a unanimous Court of Appeals, the Chief Judge upheld a subpoena served by the New York City Commissioner of Accounts in connection with an investigation into the system of condemnation of real property for City

purposes, and stated with reference to the argument that the documents sought were not pertinent to the inquiry:

> "Very often the bearing of information is not susceptible of intelligent estimate until it is placed in its setting, a tile in the mosaic. Investigation will be paralyzed if arguments as to materiality or relevance, however appropriate at the hearing, are to be transferred upon a doubtful showing to the stage of a preliminary contest as to the obligation of the writ. Prophecy in such circumstances will step into the place that description and analysis may occupy more safely. Only where the futility of the process to uncover anything legitimate is inevitable or obvious must there be a halt upon the threshold." (pp. 381, 382).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, WITH COSTS AND DISBURSEMENTS.

Dated: Brooklyn, New York,
May 13, 1959.

Respectfully submitted,

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PETITION NOT PRINTED

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Supreme Court of the United States

OCTOBER TERM 1958.

No. 842

ANONYMOUS NO. 16 and ANONYMOUS NO. 17 (individually) and ANONYMOUS NO. 16 and ANONYMOUS NO. 17 (as copartners),

Petitioners,

—against—

HON. GEORGE A. ARKWRIGHT, a Justice of the Supreme Court of the State of New York and DENIS M. HURLEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE RELIEF SOUGHT BY PETITIONERS AND THE DECISIONS BELOW

Petitioners seek a writ of certiorari to review an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on October 9, 1958, denying their motion to vacate two subpoenas and a subpoena duces tecum issued to them by respondents and, jointly or in the alternative, a writ of certiorari to review an order of the Court of Appeals of the State of New York made and entered January 15, 1959 denying to peti-

PETITION NOT PRINTED

tioners leave to appeal to that Court from the aforesaid order of the Appellate Division.

There were no opinions by either the Court of Appeals or the Appellate Division. Copies of the order of the Appellate Division denying the motion, the order of the Appellate Division denying petitioners' leave to appeal to the Court of Appeals and the order of the Court of Appeals denying them leave to appeal, are set forth in Appendix B of the petition (pp. 35-41).

STATEMENT; QUESTION PRESENTED AND ARGUMENT

The Statement, Question Presented and Argument in this proceeding No. 842 are omitted from the within brief as they are the same as in proceeding No. 841.

Except for the fact that the petitioners herein are law partners and that they were served with subpoenas *ad testificandum* as well as a subpoena duces tecum calling for the financial records of their law firm relating to certain specified cases, the petition for certiorari (No. 841) submitted to this Court with regard to Anonymous No. 14 is almost verbatim (certain immaterial facts and dates excepted) with the petition herein. We are submitting simultaneously herewith a brief in No. 841 (Anonymous No. 14) which, in our view, answers the arguments made in the instant petition. Accordingly, we refer the Court to our brief in No. 841 and respectfully request that the Court treat that brief as the respondents' brief in opposition to the instant petition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED, WITH COSTS AND DISBURSEMENTS.

Dated: Brooklyn, New York,
May 13, 1959.

Respectfully submitted,

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